STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Michigan Court of Appeals
(Judges Mark Boonstra, Joel P. Hoekstra and Henry William Saad)

MICHAEL A. RAY AND JACQUELINE M. RAY, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY,

Plaintiffs,

v

Case No. 12-1337-NI
COA No. 322766
Hon. Carol Kuhnke

ERIC SWAGER,

Defendant.

/

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PLAINTIFFS MICHAEL A. RAY'S AND JACQUELINE M. RAY'S, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY, APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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PROOF OF SERVICE

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Dated: November 25, 2015

TABLE OF CONTENTS

INDEX OF AUTHORITIES

ORDER APPEALED FROM AND RELIEF SOUGHT

On October 15, 2015, the Court of Appeals issued its opinion and order which held that Defendant was entitled to summary judgment regarding Plaintiff's claim of gross negligence (See Exhibit X). The Court of Appeals thus reversed the July 1, 2014, order of the Washtenaw Circuit Court denying defendant's motion for summary disposition. In reversing, the Court of Appeals held that there were no genuine issues of material fact relating to whether the Defendant, a public school athletics coach, was the proximate cause of Plaintiff's injuries.

Plaintiff now seeks leave to appeal the decision of the Court of Appeals pursuant to MCR 7.302. As Plaintiff's Application will set forth, that review is proper for several reasons identified by MCR 7.302(B). Specifically, pursuant to MCR 7.302(B)(2), this issue in this case is of significant public interest and involves claims levied against a state actor. Under MCR 7.302(B)(3), the issue in this matter is of major significance to the state's jurisprudence. Finally, under MCR 7.302(B)(5), the decision of the Court of Appeals is both clearly erroneous *and* conflicts with both decisions of the Court of Appeals and decisions of this Court.

It appears that this opinion amounts to the first time the Court of Appeals has applied this Court's recent decision in *Beals v State*, 497 Mich 363 (2015). Where the Court of Appeals misapplied that opinion, this Court should grant this Application for Leave to Appeal to ensure that future opinions of the Court of Appeals accurately interpret this Court's binding precedent. This Court has seen firsthand the dangers of allowing misinterpretation of its precedent to go uncorrected. For example, this Court's opinion in *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157; 809 F3d 553 (2011) was necessitated by the Court of Appeals routinely misinterpreting this Court's holding in *Fultz v Union-Commerce Assocs*, 470 Mich 460, 469-470, 683 NW2d 587 (2004). Because of that routine misinterpretation, the rule of law this Court

intended to put into effect in 2004 in *Fultz* did not in actuality take hold until 2011. A similar danger exists here. Should the erroneous decision of the Court of Appeals be allowed to stand in this case, future panels of the Court will likely look to this opinion when determining how the *Beals* opinion is to be interpreted and applied. The result of a misinterpretation of Beals would, of course, be of significant public concern as it would wrongfully deprive injured individuals of a remedy.

QUESTION PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION ON THE BASIS THAT THERE WAS NO GENUINE ISSUES OF MATERIAL FACT RELATING TO WHETHER DEFENDANT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES?

TRIAL COURT ANSWERED: YES
COURT OF APPEALS ANSWERED: NO
DEFENDANT-APPELLEE ANSWERED: NO
PLAINTIFF-APPELLANT ANSWERED: YES

II. SHOULD PLAINTIFF HAVE BEEN OBLIGATED TO PROVE THAT DEFENDANT WAS THE ONE MOST IMMEDIATE, DIRECT AND EFFICIENT CAUSE OF HIS INJURIES?

TRIAL COURT ANSWERED: YES
COURT OF APPEALS ANSWERED: YES
DEFENDANT-APPELLEE ANSWERED: YES
PLAINTIFF-APPELLANT ANSWERED: NO

PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

This cause of action arises out of the truly tragic events that occurred during the early morning hours of September 2, 2011. That morning, 13-year old Kersch Ray followed the order of his cross-country coach, defendant Eric Swager, to cross a road against a red light. He was then struck by a car. As a result of the accident, Kersch had a portion of his skull removed. He suffered several broken bones and was in a vegetative state for months. He had to learn to speak again and now suffers from dementia. He will require care for the remainder of his life because he did exactly what we ask of children: he followed the instructions of an authority figure.

STATEMENT OF FACTS

Factual Background

On September 2, 2011, Kersch Ray was preparing to start his freshman year at Chelsea High School. That day, the freshman students were scheduled to attend an orientation session at the high school. The Chelsea High School Cross Country team held an early practice that morning that would enable to the freshmen students to practice and then attend their orientation. The practice that morning was scheduled to begin at 5:59 a.m (Deposition of Eric Swager, Attached as Exhibit B, p 149). It was, according to Coach Swager, the first morning practice that had been held during Kersch's involvement with the team. (Exhibit B, p 150)

As one would expect, and as team member Stuart Cook testified, it was "very dark" at that time of day (Deposition of Stuart Cook, Attached as Exhibit J, p 8). Despite that darkness, defendant Swager did not mandate that the team members wear reflective clothing or safety vests or carry flashlights (Exhibit B, pp 113, 186-189; Exhibit J, p 31). The team began the run at the high school. The plan that day (in contrast to the arguments in defendant's brief) was to conduct a warm-up run *as a team*, in which the entire group of roughly 20 runners (and one coach) would run together. Then, after that warm-up was complete, the runners would complete a "hard mile," during which time each student would presumably run to the best of his abilities, without regard to staying together (Exhibit J, pp 10-11).

The accident at issue in this case occurred during the warm-up period of the run (Exhibit B, p 81). The team was running along Freer Road, toward Old US 12, which is a two lane highway with a turn lane (Deposition of Scott Platt, attached as Exhibit D, p 16). When the team reached the intersection with Old US 12, the team came to a stop because it encountered a Do Not Walk signal. One of the team members, Mitchell Henschell, pushed the button at the intersection to

cycle the traffic light (Deposition of Mitchell Henschell, attached as Exhibit F, p 13).[1] Consequently, the traffic light would have changed to a walk sign in just a short period of time. Nonetheless, as Henschell testified, Coach Swager then told the team to run across the road despite the Do Not Walk signal (Exhibit F, p 13).

Just as it has become clear that Coach Swager told the team to cross the street despite Henschell having already pushed the button to cycle the light, it is equally clear that Swager was aware that there was a vehicle driving toward the team on Old US 12 (Exhibit B, p 32). That vehicle was the vehicle that ultimately struck Kersch Ray. Swager testified that he saw the vehicle's headlights and judged that it was far enough away to safely cross the street (Exhibit B, pp 176-177). The team, consistent with his instruction, began to cross. This series of events was not unusual for Coach Swager's team. As Charles Miller testified, the team was accustomed to Swager ordering them to cross the street (Deposition of Charles Miller, attached as Exhibit E, p 18). Bram Parkinson testified that once he heard that it was okay to cross, he ran without looking for traffic (Deposition of Bram Parkinson, Attached as Exhibit H, p 30).

Adam Bowersox, one of the team members, testified that as he got into the street, he could hear Coach Swager yelling to "go faster," which could reflect that the vehicle was approaching faster or was closer than Swager initially believed (Deposition of Adam Bowersox, attached as Exhibit G, p 22-23). Indeed, Plaintiff's accident reconstruction expert, Lt. Timothy Abbo, has stated in his affidavit that one cannot adequately judge the distance and speed of a vehicle when it is dark outside (Abbo Affidavit, attached as Exhibit T). Likewise, Sergeant Kinsey, who was involved in the investigation of the accident, has testified that "I like most officers and most people

[1] The opinion of the Court of Appeals seems to overlook Coach Swager's act of overriding the decision to wait for the light to change and instead implies that every team member decided for himself whether it was safe to cross.

have a problem judging speed at night. I believe, this is not scientific, I'm not an accident investigator, but it's, you know, where the headlights are, how close they are to each other, how close they are to the ground and sometimes speed can be deceiving." (Deposition of Sergeant Kinsey, attached as Exhibit L, p 37.)

The vehicle that was approaching was driven by Scott Platt. As Mr. Platt testified, he was not eating or drinking in the car prior to the accident. He was not listening to the radio. His headlights were on. (Exhibit D, p 9.) He was not on medication and he had not been drinking (Exhibit D, p 12). He was not running late that morning. Instead, he was driving in a responsible manner and was travelling *below* the posted speed limit of 45 miles per hour (Exhibit D, p 14).

When Platt was approximately 10 feet from the intersection, he saw a group of runners in the right corner of his vision. Platt testified that while some of the runners to his right had completely crossed Old US 12, a couple of runners were still in the road. Then, within "milliseconds," he felt an impact on the left side of his car. Platt's vehicle had collided with Kersch, as well as one of his teammates, Adam Junkins (Exhibit D, pp 19-22).

Platt testified that he didn't see Kersch until he actually collided with him (Exhibit D, p 41). When asked whether he knows of anything the driver did wrong, Officer Stitt, who was involved in the investigation, testified "I'm not aware of anything, no." (Deposition of Officer Stitt, attached as Exhibit M, p 31.) Consistent with that opinion, Platt was never charged with any form of wrongdoing in connection with these events. The Washtenaw County Sheriff's Department conducted a full accident reconstruction and determined that Platt did not cause the accident (Attached as Exhibit O). Plaintiff's accident reconstruction expert, Lt. Timothy Abbo, has confirmed that conclusion (See Exhibit T). When asked what his view was of Platt's actions, team member Joseph Vermilye testified "Well, because it was like really dark and none of us had

reflective stuff. And by the time he saw us, he was probably way too close to brake." (Deposition of Joseph Vermilye, attached as Exhibit N, p 26)

While Adam Junkins was fortunately not seriously injured in the accident, Kersch's injuries were catastrophic. His body went over the top of Platt's car and landed on the road. Jason Patrick was riding his motorcycle that morning when he came upon the accident scene. As Mr. Patrick's affidavit states, when he arrived at the scene, he saw a man (Coach Swagger), administering first aid to "a child laying in the road." As a former firefighter who was trained in first aid, Mr. Patrick stopped at the scene. He "observed that the injured child appeared to have two broken legs and a broken arm. He was not conscious, was not breathing, had a thready pulse and was bleeding from both the arm and the nose." (Affidavit of Jason Patrick, attached as Exhibit S.)

Mr. Patrick waited with Coach Swager for emergency responders to arrive. During that wait, Mr. Patrick asked Swager how the accident occurred. Swager told Mr. Patrick that he didn't realize he had a runner lagging behind and that the runner was struck by a car. (Exhibit S.)

Contrary to Coach Swager's statement at the scene, he did not simply have "one runner" behind him. Based on the evidence in this record, we know that when Platt's vehicle entered the intersection, at least five runners had not made it across the road. Platt testified that he saw a group of runners to his right. He stated that while most of those runners had made it across the street, he believed two of the runners to the right were in the road still (Exhibit D, p 32). In addition to those two runners, Kersch and Junkins were in the road and were both struck by Platt's vehicle. Finally, we know that a fifth runner, Ryan Pennington was the last runner in the group and had not yet made it to the road when Kersch was struck (See Chelsea Police Report, attached as Exhibit P).

As is discussed in further detail below, defendant's motion for summary disposition was premised on the argument that there were essentially two groups of runners that day: "his" group

and then a second group composed of Kersch, Junkins and Pennington. Defendant argues that while he did instruct "*his*" group to cross the street, his instruction did not apply to the Kersch/Junkins/Pennington group and would not have been heard by that group.[2] In support of that argument, defendant has presented this Court with an affidavit from Junkins, in which he states that he did not hear Swager's order to cross the street and that he made his own decision to cross.

The Junkins affidavit explicitly contradicts multiple portions of the record. First, on the day of the accident, Junkins told the police officers that he could hear Coach Swager yelling "Let's go! Let's go! Let's go!" as the team crossed Old US 12. Junkins told the police that fact both at the scene (which amounts to an excited utterance and is thus admissible evidence) and in a subsequent interview at the school (See Exhibit P). While Junkins was sent a notice to appear for deposition, he did not attend and thus has not been questioned regarding his contradicting accounts of the accident (See Exhibit Q).

Just as Junkins told the police that he could hear Coach Swager's order, Ryan Pennington likewise told police that he could hear Swager's order. Pennington's statement is significant because he was the farthest runner from Coach Pennington that morning. By his own estimate, Pennington was up to 50 yards behind Kersch and Junkins (See Exhibit P). Pennington was sent notices to appear for two depositions (See Exhibit R). Like Junkins, he did not comply.

As the Court will see when reading defendant's brief (assuming defendant maintains the positions he took in the trial court and the Court of Appeals), defendant describes these events as if Kersch and Junkins were significantly trailing the rest of their team. Not so. Teammate Charles Miller, who was ***not*** one of the so-called "stragglers," estimated that Kersch was as close as 5 or 6 feet to him when the accident occurred. Miller was close enough that he could feel the "whoosh"

[2] Kersch, as one would expect, has no memory of the events due to his traumatic brain injury.

of the air as the car struck Kersch. He said that the accident occurred "directly behind" him. (Exhibit E, pp 16, 21.) Teammate Bowersox, who was also not one of the alleged stragglers, testified that Kersch was 1-2 meters (or 3-6 feet) behind him at the time of the accident (Exhibit H, p 13).

For his part, Coach Swager has admitted that but for his actions, this accident would have never occurred. During his deposition, the following exchange occurred:

> **Q**. Yes sir. So if the car passes -- if you say nobody run, car coming, we're at a red light, whatever you want to say, car passes, accident will never happen?
>
> **A**. If we wait until that car passes –
>
> **Q**. Yeah.
>
> **A**. --that car would never hit us. I would agree with that.
>
> **Q**. Fair enough.
>
> **A**. I mean I agree with that. If he wait – if everyone waits until the car passes, then, no, that car – that car wouldn't have hit us.
>
> **Q**. Okay.
>
> **A**. I would agree with that. [Exhibit B, pp 180- 181.]

Just as Coach Swager has admitted that this accident would have never occurred if he had simply told his team to wait for car to pass, testimony also confirms that Kersch did nothing wrong in the moments preceding the accident. Charles Miller testified as follows:

> **Q.** Okay. And when Kersch crossed the street, you know, following you and the other team members, he was doing exactly what the people in front of him were doing; is that correct? Meaning running across the street?
>
> **A.** Yes.
>
> MR. MILLER: Objection as to form and foundation.
>
> **A.** But, yes.

Q. I'm sorry. I didn't hear your answer.

A. Yes.

Q. Okay. So he wasn't doing anything different than you were doing, per se?

A. Nope. [Exhibit E, pp 36-37.]

Miller specifically testified that he did not blame Kersch for the accident (Exhibit E, p 31). Likewise, teammate Stuart Cook testified as follows:

Q. Okay. Do you know of anything that Kersch -- do you know. You know, I know you could maybe hypothesize or speculate. But as we sit here today, do you know of anything that Kersch did wrong?

A. No, I do not. [Exhibit J, p 36.]

Bram Parkinson testified that when Swager told him to run, he ran without looking to see whether any traffic was coming. He confirmed the accuracy of the following statement: "Coach verbally instructed everyone to go, so we went." (Exhibit H, pp 29-31.) That testimony was consistent with team member David Trimas, who testified as follows:

Q. Okay. And he's in charge at that point, I'm assuming?

A. Yes.

Q. Okay. So when Coach says we can go, everyone goes?

A. Yes.

Q. Is that fair?

A. Yes. [Exhibit K, p 32.]

Scott Platt, the driver, also happened to be a coach of youth sports. Platt explained that in a team setting, coaches are in charge (Exhibit D, p 26). According to Platt, members of teams do what their coaches tell them to do (Exhibit D, p 29) Platt opined that if Swager told his team to cross despite the Do No Walk sign (which he admittedly did), that would be an unreasonable

request (Exhibit D, p 28). Similarly, Officer Gilbreath, one of the investigating officers, testified that Coach Swager was the only adult with the team that day and that he was in the position of an authority figure. He further testified that all the available information showed that Swager told the team to cross the street despite the Do Not Walk sign. Officer Gilbreath testified that there is no situation in which it is permissible to cross against a Do Not Walk signal. (Exhibit I, pp 15-18.) As will be discussed below, Plaintiff's expert witness, Corey Andres, has submitted an affidavit in which he confirms the variety of safety errors made my Coach Swager (See Exhibit U).

Finally, it should be noted that the record demonstrates numerous prior instances in which Coach Swager disregarded safety. As Sergeant Kinsey explained, a man contacted Chelsea Police after Kersch's accident to explain that just a couple of days prior, he was surprised by the Chelsea Cross Country Team as they came "out of nowhere" while he was driving down Freer Road (Exhibit L, p 13). In addition, Officer Gilbreath, had two prior encounters with Coach Swager in 2009 or 2010. Both of those instances involved Coach Swager showing questionable decision making ability regarding his team's safety. In one instance, some of Coach Swager's runners could not be found during the course of a "swamp run" that Coach Swager organized. The runners were located just prior to Officer Gilbreath calling in for air support from helicopters. In the second instance, Officer Gilbreath pulled over Coach Swager, who was driving with several of his team members in his pickup truck. The runners were not wearing seatbelts and Swager was instructed to ensure they were properly belted. (Exhibit I, pp 20-21.)

Procedural History

As a result of the serious injuries he incurred in this accident, Kersch initiated this cause of action. The present appeal arises out of the denial of a motion for summary disposition. Defendant filed his motion for summary disposition on April 10, 2014. Defendant's motion argued that

Plaintiff's cause of action must be dismissed because there were no genuine issues of material fact relating to 1.) Whether Coach Swager was grossly negligent and 2.) Whether that gross negligence was the proximate cause of Kersch's injuries.

Plaintiffs filed their response to defendant's motion on May 21, 2014. Plaintiff's response demonstrated that defendant's motion was entirely based on a selective recitation of facts. Essentially, defendant was urging the trial court to view the record in the most favorable to defendant despite the fact that he was a moving party. Defendant was also urging the trial court to resolve a variety of factual disputes in favor of defendant. Like in the present brief, Plaintiff presented thorough citations to the record evidence to demonstrate that the entire team crossed the road because they were ordered to do so by Coach Swager and that the accident would not have happened but for that order. Plaintiffs supported their arguments with legal authority and directed the trial court to *White v Roseville Public Schools and Matthew Komarowski*, unpublished opinion of the Court of Appeals (Docket No. 307719) and *Hurley v L'anse Creuse School District and Joe Politowicz,* unpublished opinion of the Court of Appeals (Docket No 310143) (attached, respectively, as Exhibits V and W).

The trial court held a hearing on the motion for summary disposition, at which the parties largely reiterated the positions from their briefs. During defense counsel's argument, the trial court demonstrated that it was deeply familiar with the record in this case and refuted much of defendant's argument. Consider the following passage:

> I would agree with you wholeheartedly if the coach were back at the school and had sent all of the runners out and -- and told them individually go run five miles and -- and come back here. You can run any path you want. You can -- you can run as a pack or you can run in small groups, or whatever.
>
> But here you have a situation where the entire team is running together and there's at least some evidence that this is the warm-up where they're supposed to stay together as a pack and -- and not run to the best of their abilities, but run as a team.

> The coach is running with them. The coach makes the determination. Despite the fact that they're all waiting for the light, the coach says, in essence, we're not gonna wait for the light. I've looked and it's clear. Let's run. And -- and you even have other -- other team members saying when the coach tells you to go, you go. [Hearing, p 6.]

The court also noted that the facts were disputed in relation to whether the entire team was together at the time of Coach Swager's command and noted the need to view the evidence in the light most favorable to Plaintiffs (Hearing, pp 6-7).

At the close of the hearing, the Court issued its ruling from the bench. The Court stated:

> this case is extremely fact laden and -- and the defendant's motion is for summary disposition based on governmental immunity, which will require that a jury find that the defendant's actions were the proximate cause of the injury and that the defendant's actions were grossly negligent. And I think that under the -- the facts and circumstances described here, there's no one but a jury that can make that determination. So I'm denying the Motion for Summary Disposition. [Hearing, p 22.]

The Court issued a written order denying the motion on July 1, 2014.

Because the denial of the motion involved a denial of a claim of governmental immunity, Defendant filed an appeal as of right with the Court of Appeals. Defendant's brief to the Court of Appeals echoed the arguments presented below, as did Plaintiff's response. However, while the appeal was pending, this Court issued its opinion in *Beals v State*, 497 Mich 363 (2015). As will be discussed in detail below, the *Beals* opinion addressed the concept of "the" proximate cause in an action against a lifeguard who failed to save the Plaintiff-decedent from drowning. During oral argument, defense counsel informed the panel of the *Beals* opinion and utilized the opinion to argue that the trial court erred regarding its proximate cause conclusion.

Like defense counsel, Plaintiff's counsel was also prepared to discuss whether *Beals* had any impact on the question before the Court. Plaintiff argued that *Beals* was distinguishable from the present case and, by its own language, was inapplicable. Specifically, Plaintiff directed the

Court to footnote 30 in *Beals*, which addressed the concept of affirmative conduct. While the Defendant in *Beals* took no affirmative conduct, Coach Swager did.

On October 15, 2015, the Court of Appeals issued an opinion reversing the denial of summary disposition. The trial court never addressed the subject of gross negligence. Instead, the Court ruled that because no reasonable finder of fact could determine that Defendant was the proximate cause of Plaintiff's injuries, summary disposition was required. The Court relied on *Beals*, as well as several other opinions, in reaching its conclusion.

Plaintiff now files his application for leave to appeal and respectfully requests that this Honorable Court peremptorily reverse the decision of the Court of Appeals, for the reasons stated by the trial court. Alternatively, Plaintiff requests that this Court grant this application for leave to appeal in order to review whether the trial court properly applied *Beals* and the progeny of *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), or whether those opinions properly interpreted MCL 691.1407(2).

STANDARD OF REVIEW

Defendant argued that summary disposition was proper pursuant to three distinct court rules. First, defendant directed the Court to MCR 2.116(C)(7), which provides that a motion for summary disposition may be raised where a claim is barred because of immunity. To survive a motion brought pursuant to MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). "All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Smith*, 223 Mich App at 616. A plaintiff can overcome such a motion by alleging facts that support application of an exception to governmental immunity.

Burise v City of Pontiac, 282 Mich App 646, 650; 766 NW2d 311 (2009).

Defendant also contended that summary disposition was proper under MCR 2.116(C)(8). "A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 424 (2008). As the Michigan Supreme Court has explained, "[i]n reviewing the outcome of a motion under MCR 2.116(C)(8), we consider the pleadings alone. We accept the factual allegations in the complaint as true and construe them in a light most favorable to the nonmoving party." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

Finally, defendant argued that summary disposition was proper pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (emphasis added). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Only where the Court is satisfied that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law is summary disposition proper. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In the context of MCR 2.116(C)(10), the Michigan Court of Appeals has stated that it "is liberal in finding a genuine issue of material fact," *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 130; 793 NW2d

593 (2010).

ANALYSIS

I. The Court of Appeals erred in concluding that Defendant was entitled to governmental immunity

Pursuant to MCL 691.1407(2)(c), a government employee such as Coach Swager is not subject to tort liability if "The officer's, employee's, member's, or volunteer's conduct does not amount to [1.] gross negligence that is [2.] the proximate cause of the injury or damage." In the present case, the Court of Appeals concluded that it was unnecessary to address the gross negligence portion of that statute because it concluded that reasonable minds could not differ regarding the proximate cause requirement. In light of that holding, Plaintiff will limit his argument and likewise not address the gross negligence element, which is thoroughly briefed in Plaintiff's Response that was filed in the Court of Apppeals.

A. A reasonable juror could conclude that Coach Swager was the proximate cause of Plaintiff's injuries

This Court has previously concluded in *Robinson v City of Detroit*, 462 Mich 439, 462 (2000), that when the legislature used the term *the* proximate cause in MCL 691.1407(2)(c), it meant that for liability to exist in a claim against an individual government actor, the act at issue must be "the one most immediate, efficient, and direct cause of the injury or damage." When speaking of proximate cause, the Court of Appeals has stated that "Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law." *Nichols v Dobler*, 253 Mich App. 530, 532 (2002). Here, the Court of Appeals erroneously concluded that Coach Swager could not be considered the proximate cause of the injury at issue because Plaintiff's own decision to run into the road, as well as the driver that struck

Plaintiff, were both more direct and immediate causes of the injury.

Defendant Swager was specifically questioned regarding the issue of proximate cause. Based on his own admission, had Defendant Swager simply waited for the light to turn green or the vehicle to pass, that the accident would never have occurred:

> **Q**. Yes sir. So if the car passes -- if you say nobody run, car coming, we're at a red light, whatever you want to say, car passes, accident will never happen?
>
> **A**. If we wait until that car passes –
> **Q**. Yeah.
>
> **A**. --that car would never hit us. I would agree with that.
> **Q**. Fair enough.
>
> **A**. I mean I agree with that. If he wait – if everyone waits until the car passes, then, no, that car – that car wouldn't have hit us.
> **Q**. Okay.
>
> **A**. I would agree with that. (See Exhibit B, pp 180-181)

Despite that testimony, the Court of Appeals agreed with defendant's argument that Kersch was the proximate cause of his own injury because he chose to cross the street when it was not safe to do so. In addition, defendant *very* briefly argued (and the Court of Appeals apparently agreed) that Platt, as the driver of the vehicle, was a more immediate cause of Kersch's injuries. This application will quickly address the arguments before turning to the arguments regarding Kersch.

Regarding Platt, defendant's only argument regarding proximate causation is that Platt was speeding through a yellow light when he struck Kersch. That is simply false. Platt testified that he never reached the speed limit of 45 miles per hour that morning. He further testified that the traffic light turned yellow *as he entered the intersection*. Officer Stitt testified that he was not aware of anything that Platt did wrong. The Washtenaw Count Sherriff's Department's accident reconstructionist stated that Platt was not at fault for the accident and could not have avoided

Kersch. Lt. Abbo has reached the same conclusion. Platt was never charged with any infractions relative to the accident. There is no evidence to support a finding that he caused this accident.

While defendant briefly argued that Platt could be considered the proximate cause of this accident, the focus of defendant's argument was that Kersch, a 13 year old, was the actual cause of his own injuries. The opinions in *White* and *Hurley* demonstrate the lack of merit in defendant's proximate cause argument.

Though lengthy, the following passage from *White v Roseville Public Schools and Matthew Komarowski, unpublished opinion of the Court of Appeals (Docket No. 307719)* indisputably demonstrates that this motion for summary disposition was properly denied by the trial court.[3] In *White* (attached as Exhibit V), the Plaintiff was injured when he used a table saw that was not equipped by a safety guard. The evidence demonstrated that the defendant teacher had previously demonstrated how to use the saw to his students, including Plaintiff. During those demonstrations, the Defendant did not use the saw's guard but allegedly instructed his students to *not* emulate his technique (in contrast to Coach Swager, who instructed his students to replicate his unsafe conduct). When the Plaintiff attempted the same conduct, he cut three of his fingers.

In *White*, the defendant argued that because the plaintiff was injured by his own negligence while using a table saw, he could not show that the defendant was the proximate cause. Much like this defendant, the defendant in *White* took the position that "negligent supervision can never be the proximate cause of an injury, because the act that allegedly could have been prevented with proper supervision will always be more immediate, efficient, and direct than the negligent

[3] Plaintiff is of course aware that unpublished opinions of the Court of Appeals are not binding precedent. However, *White* and *Hurley*, the opinions on which Plaintiff has relied, are two of the most recent opinions of the Court of Appeals that address the concept of the proximate cause and both involve claims by students against teachers. The decision in the present case is inconsistent with those recent opinions and, more importantly, inconsistent with this Court's language in *Beals*.

supervision." When addressing the argument that the student in *White* was the proximate cause of his own injuries, the Court of Appeals stated:

> The evidence in this case, however, was not limited to negligent supervision. The evidence showed that defendant not only failed to adequately monitor those in his charge, he modeled the hazardous activity that led to plaintiff's injury, and assisted or supervised plaintiff as he copied the hazardous behavior on other occasions. Although defendant contends that the proximate cause was plaintiff's decision to use the saw to perform a dangerous rip cut without the blade guard down, defendant admittedly had demonstrated that same procedure to plaintiff. The fact that the injury occurred while plaintiff was attempting to copy defendant's method supports plaintiff's contention that defendant's conduct was the proximate cause of the injury, and there were no other more direct causes. We believe that where defendant had demonstrated hazardous use of the table saw, failed to take measures to limit unsupervised use of the saw, and plaintiff was injured while attempting to copy defendant's methods, a reasonable jury could determine that defendant's conduct was the proximate cause of plaintiff's injury. Thus, the trial court properly denied summary disposition on the issue of proximate cause.

Just like the defendant in *White* could be considered the proximate cause where he demonstrated the very conduct that caused his student to be injured, so to could Swager be considered the proximate cause where he demonstrated the conduct that caused Kersch's injury. In *White*, there was evidence that the teacher that demonstrated the unsafe conduct specifically told the plaintiff not to emulate his behavior. In contrast, there is no dispute that Swager ordered his team to follow his dangerous lead.

Like in *White*, the Court in *Hurley* also demonstrated that a student is not the proximate cause of his own injuries when those injuries result from following a teacher's instructions. The Court in *Hurley* upheld the denial of Summary Disposition to a gym teacher who ordered one of his students to perform sit-ups following return from a prior knee injury, causing injury. The defendant argued that even if he instructed the plaintiff to perform the situps that caused his injury, the student ultimately made the decision to partake in that conduct. The Court held that defendant's argument was not a sufficient basis for granting summary disposition because "there

was evidence from which the jury could conclude that Politowicz's decision to compel Hurley to perform situps played a far more significant role than Hurley's decision to not more vigorously resist. Therefore, there was a question of fact on the issue of causation."

Like in *Hurley*, a jury could conclude that Kersch was compelled to run across the road because of his coach's orders *just like every other runner on the team*. Kersch was a 13-year old boy who was participating in a high school sport for the first time. Any reasonable coach would have known that Kersch would do exactly what his coach told him to do, because that is what responsible children are taught to do. In light of the authority he had over his team, Coach Swager had two choices: he could have ordered his team to stop and wait for a walk signal, or he could order his team to run. He chose the path of danger and cannot now avoid liability for that decision.

Rather than direct the Court of Appeals to the recent and analogous decisions in *White* and *Hurley*, defendant instead relied on a variety of clearly distinguishable cases. For example, defendant contends that this case is somehow analogous to *Gray v Cry*, unpublished opinion of the Court of Appeals, issued September 20, 2011 (291142), in which the plaintiff brought suit against his coach after one of his teammates injured the plaintiff through an intentional battery. The Court concluded that the intentional torfeasor was *the* proximate cause of the injuries. The present case involves no third-party who successfully and intentionally injured Kersch. This case is not *Gray*.

Defendant also directed this Court to *Watts v Nevils*, unpublished opinion of the Court of Appeals, issued September 18, 2007 (Docket No. 267503), in which an 11 year old child died when drowning in a swimming pool that was not being adequately supervised. As defendant explained, the *Watts* Court concluded that the child's decision in that case was the proximate cause of his injuries and that the negligent supervision was, at most, *a* cause. The Court in *Watts* noted that there was evidence that the child was pushed into the pool by another classmate. Moreover,

the Court explained that "the parties have not presented evidence indicating that an action, or the inaction, of Brown, Nevils, Harris, Joyce Ewing, or Arlee Ewing was the one most immediate, efficient, and direct cause of Watts' death. Instead, the evidence provided by the parties indicates that Brown, Nevils, Harris, and Arlee Ewing were not even at the pool at the time Watts drowned."

Unlike in *Watts*, defendant Swager was most assuredly at the scene of the accident. More importantly, unlike in *Watts*, defendant Swager not only demonstrated the behavior that caused Kersch to be injured, he instructed Kersch to engage in that behavior. This case is not *Watts*.

On appeal, defendant also cited to *Booth v Mass Trans Aut*, unpublished opinion of the Michigan Court of Appeals, issued June 21, 2011 (Docket No. 297538). In *Booth*, the Plaintiff exited the defendant's bus and ran in front of oncoming traffic. The Court held that the bus driver was neither grossly negligent nor the proximate cause. Instead, the Court held that the Plaintiff was the proximate cause of his own injuries because he voluntarily ran in front of the oncoming car.

Booth, if anything, reaffirms that the trial court in this case did not err. Unlike in the present case, the bus driver in *Booth* did not specifically order the Plaintiff into the path of the oncoming car. Unlike the present case, the bus driver in *Booth* was not an authority figure in relation to the Plaintiff. Rather, the defendant in Booth merely stopped her bus *at a bus stop*. The defendant in *Booth* also tried to prevent the accident by honking the bus's horn when she saw the oncoming danger. None of those facts exist in this case. Moreover, this Court in *Booth* also noted that the driver of the vehicle was driving below the speed limit and had no opportunity to avoid the Plaintiff. In other words, *Booth* reaffirms that Platt cannot be considered the proximate cause of Kersch's injuries.

Defendant also relied on the opinion in *Tarlea v Crabtree*, 263 Mich App 80 (2004), in

which the Plaintiff's estate brought suit after the Plaintiff died during an optional run during a football practice. Regarding the issue of proximate causation, this Court specifically noted that "All the students, including *Tarlea*, had the choice of participating or not participating in the run. Some students decided not to participate, but *Tarlea* voluntarily opted to run." *Id.* at 92. The Court noted that the players who chose to run were permitted to stop at any time to get water. Further, *Tarlea* was medically cleared to participate in the practice by a doctor, was the only student to exhibit any health problems during the practice, and died of unknown causes because an autopsy was never performed. *Id.* at 92-93.

Tarlea bears no resemblance to this case. Unlike in *Tarlea*, crossing the street was not an optional activity. Every runner on the team either crossed or attempted to cross the road in direct response to defendant's order. Unlike in *Tarlea*, the coach in this case did not take safety precautions. Rather, he had his students running in the dark, with no illuminating gear and specifically prevented them from stopping at the traffic light when they attempted to do so. Unlike in *Tarlea*, the cause of Kersch's injury is not unknown. Kersch was hit by a car due to no fault of the driver when he entered the intersection upon being so ordered by this defendant.

Defendant's decision to point the finger at Kersch and Platt is consistent with his failure to recognize his role in this accident. Defendant asked the Court of Appeals to conclude that it was a "collective decision" to cross the street and that the action was not compelled by Coach Swager. To being, there is no such thing as a collective decision when an adult is coaching a team of children. Kersch Ray was a mere *13* years old at the time of this accident. Coach Swager was the only person capable of being the decision maker. Moreover, that argument is directly contrary to Coach Swager's own deposition testimony, where the following exchange occurred:

> **Q.** If some of the runners on your team in this lawsuit have testified in a deposition like this under oath that you told them to cross and that's why they did cross; in

> other words, in essence, it was an order, that you compelled them to do so, you're not going to dispute that, are you?
>
> **A.** No. (76-77)

Despite that assurance, Coach Swager (or his counsel) *is* now disputing the reason for his team crossing the street. Defendant's brief below asserted that "students of middle school and high school age are sufficiently mature and experienced to cross a street; these students know how to stop, look, and listen and determine if they can safely get to the other side of the street." In other words, defendant's sole argument was that a 13 year old boy who had just joined a cross country team should have ignored the order of his new coach, who was the sole authority figure that day. Defendant makes that argument while knowing that when the team *did* try to stop at the intersection, they were told to run anyway. Defendant also makes that argument knowing that *White* and *Hurley* both show that when a student acts consistent with a teacher's instruction and is injured as a result, there is a question of fact regarding the proximate cause.

As David Trimas testified, Coach Swager was in charge of this team and when he said run, the team ran. As the police report shows, that order to run was heard by everyone, including Junkins and Pennington, who were the farthest runners from Coach Swager. As Stuart Cook and Charles Miller both testified, Kersch did nothing differently than the rest of the team and is not to blame for this accident. In light of that evidence, a reasonable finder of fact could conclude that Swager was the proximate cause of this accident, just like the defendants in *White* and *Hurley*.

Unfortunately, the Court of Appeals accepted Defendant's argument that Kersch was a more direct cause of this injury than Coach Swager. More importantly, the Court concluded that reasonable minds could not differ regarding that point. Yet in reaching that conclusion, the Court ignored the fact that Coach Swager overruled a student's decision to wait at the intersection until the light turned green, just as the Court ignored the fact that on a team of more than 20 runners,

not a single student elected to not cross the street in the face of Coach Swager's order.

The Court's opinion actually implied that team members made individual decisions regarding whether it was safe to cross, when the Court stated "Had Ray himself verified that it was safe to enter the roadway, as did many of his fellow teammates, the accident would not have occurred." Kersch's teammates crossed the road, just as he did, not because they individually decided it was safe, but because they were told to do so by their Coach *after* first electing to not cross. That another student was struck by Platt's vehicle and other students were in the road at the time of the collision only serves to confirm that Kersch made the only decision that he perceived was available to him.

Plaintiff did not have to prove at this stage that Coach Swager was the proximate cause of this accident. Instead, Plaintiff only had to prove that there are genuine issues of material fact impacting whether reasonable minds could differ regarding that point. This record emphatically demonstrates that to be the case.

B. The Conclusion of the Court of Appeals was a product of a misinterpretation of *Beals* and other similar opinions

The opinion of the Court of Appeals referenced the *Beals* opinion in several instances. As is stated above, the opinion in *Beals* was not issued at the time of the motion for summary disposition, nor was it issued before the parties submitted their briefs to the Court of Appeals. Similarly, despite relying on *Beals* at oral argument, Defendant never sought to submit supplemental briefing regarding that opinion. Thus, unfortunately, the Court's opinion was highly dependent on a case that the parties had never briefed and that the Court of Appeals had never previously interpreted.

In *Beals*, the Plaintiff-decedent was a 19-year-old autistic individual who lived at a state-owned facility for the disabled. There was a swimming pool at the facility and that pool was

supposed to be supervised by a lifeguard. On the day in question, the lifeguard who was on duty (and who was also a resident of the facility) did not properly take to his post. Instead, during his shift, he was reportedly socializing with others instead of observing the pool. The Plaintiff, through a series of events that are not entirely known, ultimately drowned in the pool.

The *Beals* Plaintiff brought suit and alleged that the lifeguard was grossly negligent in failing to properly monitor the pool during his shift and that his gross negligence was the proximate cause of the Plaintiff's death. This Court disagreed. The Court held that "it is readily apparent that the far more "immediate, efficient, and direct cause" of the deceased's death was that which caused him to remain submerged in the deep end of the pool without resurfacing. That the reason for the deceased's prolonged submersion in the water is unknown does not make that unidentified reason any less the proximate cause of his death." Thus, because the defendant was not the proximate cause of the Plaintiff's death, he was entitled to governmental immunity.

During oral argument in the present case, Plaintiff's counsel specifically directed the Court of Appeals to footnote 30 in the *Beals* opinion. In that footnote, Justice Zahra (writing for the majority), stated "it is more clear in the instant case that the defendant government employee was not the proximate cause of the relevant death than was the case in *Dean [v Childs*, 474 Mich 914; 705 N.W.2d 344 (2005)], as Harman did not take any type of affirmative action to increase the danger posed to Beals as the defendant allegedly did in *Dean* by pushing the fire to the back of the home." In other words, in *Beals*, the Court found that the Plaintiff was seeking to hold the defendant liable for an omission, as opposed to an act.

Unlike in *Beals*, this Defendant undisputedly committed an affirmative act relative to this accident. Specifically, Coach Swager arrived at the intersection at issue. He looked to the left and saw the headlights of an approaching vehicle. He watched one of his students push the button to

activate the crosswalk light and then ordered his team to run. He did so knowing that 1.) he was the only adult in the group; 2.) his team was in the warm-up portion of their run and was supposed to stay together; 3.) his team was not wearing reflective gear in the dark of the early morning 4.) more than 20 runners needed to cross the road in front of the approaching car and 5.) the people in his care were children who would listen to him.

This Court's words in footnote 30 in *Beals* were included in that opinion for a reason: this Court was signaling to the lower courts of this State that the distinction between an act and an omission is important to the "the" proximate cause analysis. Unfortunately, the Court of Appeals in this case failed to appreciate that nuance of *Beals*. As a result, the Court held that a governmental actor can order someone in his trust to violate a law designed to protect the public and then avoid liability when his order directly results in a catastrophic injury. That cannot possibly be the state of governmental immunity in Michigan, for if it is, the exception the Legislature carved out at MCL 691.1407(2) is now meaningless, having been essentially overruled by the Courts.

As *Beals* noted, there is a difference between arguing that 1.) a defendant is liable where he fails to stop someone else from being harmed and 2.) a defendant is liable for directly placing a Plaintiff in peril by ordering him to commit the injurious act. That the Court of Appeals failed to recognize the significance of an affirmative act is further evident when looking at the other authority the Court cited. In addition to relying on *Beals*, the Court of Appeals also favorably cited to *Miller v Lord*, 262 Mich App 640, 642; 686 NW2d 800 (2004). In *Miller*, the Defendant teacher told the Plaintiff student to go into the hallway because she was allegedly misbehaving in the classroom. Unbeknownst to the teacher, when the Plaintiff went to the hallway, she was sexually assaulted at the hands of another student. The Court of Appeals held that the Defendant teacher was not the proximate cause of the claimed injury. Similar to *Beals*, the Defendant in *Miller* did

not knowingly place the Plaintiff in a position of peril. Unlike both *Beals* and the present case, the Plaintiff in *Miller* was injured as a result of an intentional tort. Respectfully to the Plaintiff in *Miller*, it is certainly problematic to assert that a negligent actor is a more direct cause of an injury that occurred as a result of an intentional tort of a third-party.

In addition to *Miller*, the Court of Appeals in this case also cited to *Curtis v City of Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002), in which the Plaintiff brought suit against the driver of an emergency vehicle. The defendant was responding to an emergency situation. The Plaintiff, seeking to make way for the approaching emergency vehicle, changed lanes and stopped his vehicle. He was then struck from behind by a different driver. The Court of Appeals held that the involvement of the defendant was too far removed from the collision to be a proximate cause of the injury. The Court specifically stated that "[Plaintiff's] decision to abruptly change lanes and stop was [just] one of many options available to him; it was not physically required by the alleged negligent operation of the emergency vehicle." Therefore, because it was the Plaintiff's conduct that preceded the injury, as opposed to the Defendant's, governmental immunity was proper.

Finally, the Court of Appeals also cited to its opinion in *Kruger v White Lake Twp*, 250 Mich App 622, 627; 648 NW2d 660 (2002). In *Kruger*, the intoxicated Plaintiff was arrested and taken to the White Lake Township Police Department. Once at the department, she was taken to the booking room and handcuffed to a ballet bar. She was apparently not being supervised and managed to escape her handcuffs. She escaped from the police department and, while fleeing, was struck in the road by a vehicle. The Court of Appeals held that the Plaintiff could not overcome the "the" proximate cause requirement where any alleged negligence was too far removed from the subject accident.

With respect to the Court of Appeals, none of the authority it relied on when reversing the trial court is analogous to the present case. Neither *Beals*, *Miller*, *Curtis* nor *Krueger* involved an instance where the Defendant affirmatively ordered the Plaintiff to commit an illegal action that immediately resulted in injury. Instead, in *Beals*, *Miller*, *Curtis* and *Krueger*, the Defendants were each seemingly unaware that the Plaintiff was in any peril at all or were not even aware of the Plaintiff's existence.

That the Court of Appeals viewed this case as being similar to *Beals*, *Miller*, *Curtis* or *Krueger* only evidences the fact that this Court's opinion in *Beals* is in peril of years of misinterpretation if the error in this case is not corrected. Plaintiff is well aware that this Court does not simply operate as an error-correcting Court, but is instead a Court that must preserve its resources for matters or jurisprudential significance. By granting leave in *Beals*, this Court indicated that the subject at issue in this case- the liability of an individual government employee- is one of public importance. If this Court does not peremptorily reverse the Court of Appeals in this case, this application must be granted in order to provide the legal community and the lower courts with concrete direction regarding proximate causation in a governmental immunity context.

II. The opinion in this case was the product of erroneous rulings in both *Beals* and *Robinson*

As is explained above, the Court of Appeals erred in concluding that reasonable minds could not differ regarding whether Defendant was *the* proximate cause of Plaintiff's injuries. While that is certainly true and obviates the need for any further argument, it must be noted that Plaintiff does not concede that the analytical framework applied by the Court of Appeals in this case was proper. Instead, the Court of Appeals required Plaintiff to meet the "the" proximate cause standard, as opposed to requiring Plaintiff to show that Defendant was "a" proximate cause of these injuries,

because of this Court's incorrect holding in *Robinson*.

As the Court is aware, prior to its decision in *Robinson*, a Plaintiff was not obligated to prove that a governmental defendant was the one most immediate, direct and efficient cause of his injuries in order to maintain a cause of action. Then came *Robinson*. In *Robinson*, the Plaintiffs were passengers in a stolen vehicle. When the police attempted to pull over the vehicle, the driver of the vehicle began to flee and a chase ensued. With the police in pursuit, the driver of the stolen vehicle crashed into a house. The driver of the vehicle was killed and his two passengers, the Plaintiffs, were badly injured.

When addressing the Plaintiffs' claim against the individual defendants for gross negligence, this Court held that under MCL 691.1407(2), the Plaintiff had to prove that the Defendant was "the" proximate cause of the injury, and not just "a" proximate cause. The Court overruled its prior holding in *Dedes v Asch*, 446 Mich. 99; 521 NW2d 488 (1994), which held that the terms "a" and "the" in this context were interchangeable. Instead, the *Robinson* Court held that the term "the proximate cause" had to be applied as written and that it was "best understood as meaning the one most immediate, efficient, and direct cause preceding an injury."

Respectfully, the *Robinson* Court erred in overruling the opinion in *Dedes*- and the opinion in *Beals*, the present case, and a host of other cases at every level of our Court system, were the natural result of that error. As Justice Kelly explained in her dissenting opinion in *Robinson*, the Michigan Legislature has expressly stated that its use of the singular may be read to encompass the plural. MCL 8.3b. There is no indication that the Legislature intended otherwise when drafting MCL 691.1407(2). Had the legislature intended to impose a singular view of proximate causation, it could have elected to expressly state that a governmental actor would only be held liable for its gross negligence if that negligence was the sole cause of the injury at issue. It did not do so.

Further, while the *Robinson* Court emphasized the importance of applying the Legislature's words as written, it nonetheless injected its *own* words into the statutory authority by stating that the phrase "the proximate cause" actually means the "one most immediate, efficient, and direct cause preceding an injury." No such language has ever been drafted or approved by our Legislature. Instead, it is a judicially selected definition with little support in the pre-*Robinson* jurisprudence of this Court.

While the *Robinson* Court may have believed that its holding was merely enforcing the language of the Legislature, it is evident in the wake of *Beals* that the natural result of *Robinson* has been the near elimination of liability under MCL 691.1407(2). While Plaintiff understands that exceptions to governmental immunity are strictly construed in favor of immunity, it also stands that our Legislature had no reason to effectuate the gross negligence exception if there was essentially no fact-pattern under which that exception would apply.

As a result of this Court's definition of "the proximate cause" provided in *Robinson*, plaintiffs like Kersch Ray have been arbitrarily deprived of their ability to obtain a remedy for clear wrongs. If Kersch Ray had been fortunate enough to attend a private school instead of a public school and then been the victim of this exact same series of events, liability would unquestionably exist. Further, prior to *Robinson*, there would have similarly been no room for debate regarding whether Coach Swager bore liability for these injuries. Where there is no statutory support for this Court's definition of the phrase "the proximate cause," it is time to revisit the meaning of MCL 691.1407(2) in order to ensure that future victims of grossly negligent governmental actors are not deprived of a remedy.

Under any standard, the Court of Appeals erred in reversing the denial of the motion for summary disposition. While this Court could certainly reverse the Court of Appeals in this case

without revisiting the holding in *Robinson* or *Beals*, this Court could also choose to now reexamine whether *Robinson* was correctly decided relative to the issue of proximate causation. That lingering question is further reasons to grant this Application for Leave to Appeal and to afford the parties a full opportunity to address this significant issue in our jurisprudence.

CONCLUSION

As the trial court properly concluded, this action is filled with factual disputes that necessitate the consideration of a jury. When viewed in the light most favorable to Plaintiff, and when considering the extensive case law cited by the parties, a reasonable juror could conclude that Swager was grossly negligent on the morning that he ordered his students to disregard the law and that his act of gross negligence proximately caused Kersch Ray's catastrophic injuries. The Court of Appeals erred in concluding that reasonable minds could not differ on the question of proximate causation because the Court failed to appreciate the significance of Defendant's affirmative action relative to this accident. This case is akin to no prior case of this Court or the Court of Appeals, and future errors by other lower courts can only be avoided by reversing the grant of summary disposition

RELIEF REQUESTED

For the reasons set forth above, Plaintiff respectfully requests that this Honorable Court peremptorily reverse the opinion of the Court of Appeals, which held that Defendant was entitled to summary disposition. Alternatively, Plaintiff requests that this Honorable Court grant this Application for Leave to Appeal and allow the parties an opportunity to fully brief and argue this issue of judicial and societal importance. Close consideration of the opinion of the Court of Appeals is particularly warranted because it is that Court's first substantive application of the decision in *Beals*, and it reveals that the *Beals* opinion is destined for misinterpretation and misapplication.

Respectfully submitted,

/s/ Christopher P. Desmond
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Dated: November 25, 2015

Certificate of Service

The undersigned hereby certifies that on November 25, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the electronic filing system which will send notification of such filing to the parties of record.

Respectfully submitted,

JOHNSON LAW, PLC

By: /s/ Christopher P. Desmond
CHRISTOPHER P. DESMOND (P71493)